Supreme Court, U.S.
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No. 03-862

In the Supreme Court of the United States

EXCEL CORPORATION,

Petitioner,

v.

ESTATE OF BRIANNA L. KRIEFALL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Wisconsin

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The decision below displaces the considered, long-established views of the expert federal agency that Congress authorized to interpret and implement the Federal Meat Inspection Act (FMIA), eliminates the uniformity mandated by Congress, and opens the door to multiple conflicting state standards that would make it virtually impossible to distribute meat without the risk of substantial criminal and civil penalties. Respondents nonetheless assert that the decision below is unworthy of this Court's attention. In part they claim that the consequences of the ruling will be trivial, and in part they contend that uniform regulation of meat safety is neither necessary nor desirable.

The *amici curiae* supporting the petition have conclusively refuted the former argument and Congress has by statute foreclosed the latter. But the federal government obviously is the most knowledgeable authority on the flaws in the decision below and its adverse effect on the Secretary of Agriculture's administration of the FMIA. The Court therefore may wish to invite the Solicitor General to file an *amicus* brief in this case expressing the views of the United States.

Alternatively, because the court of appeals' ruling is plainly inconsistent with this Court's recent decision in *Alaska Department of Environmental Conservation* v. *EPA*, 124 S. Ct. 983 (2004), the Court may wish to consider granting the petition, vacating the judgment below, and remanding the case for reconsideration in light of that intervening authority.

1. Apparently desperate to insulate the court of appeals' decision from this Court's scrutiny, respondents expend considerable energy arguing that this Court lacks jurisdiction because the decision below supposedly is not final under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). They do not dispute that the federal issue has been determined finally by the

Wisconsin court; their entire argument is that the case does not satisfy *Cox*'s statement that reversal of the state court on the federal issue should be preclusive of further litigation. Respondents are plainly wrong.

To begin with, their argument rests on a mischaracterization of the issue before this Court; they proceed as if we had sought review only of the narrow issue whether deference should be accorded to the Secretary's policy. In fact, the question presented to this Court is whether that policy should have been accorded deference *and* upheld in the circumstances of this case. *See* Pet. i. Thus, all of the alleged factual and legal issues raised by respondents are before this Court. If the Court resolves them, which it has the power to do, there will be no further litigation against petitioner on respondents' tort claims.

Moreover, respondents' contentions are baseless. For example, they imply (Opp. 11-12) that the court of appeals found that the meat at issue in this case was not "intact" within the meaning of the Secretary's policy because petitioner's HAACP plan "recognized that its intact cuts of beef were 'intended to be sold raw . . . for further processing at retail.'" Pet. App. 18a (omission in original). But the plan actually stated that meat from petitioner's plant was "intended to be sold raw (fresh or frozen) as packaged *or* for further processing at retail or export." Ct. App. Rec. 77 (emphasis added). The court of appeals accepted the trial court's determination that the meat here was *packaged* (*see* Pet. App. 11a, 17a (meat consisted of wrapped intact cuts)), which meant that it was *not* subject to further processing. Moreover, USDA regulations define "further processing" to mean additional preparation "in an official establishment" — such as a federally-inspected smoking or canning facility. 9 C.F.R. § 301.2. Because respondent Sizzler is not an "official establishment" under the FMIA, it could not as a matter of law subject meat to "further processing." Indeed, USDA has specifically acknowledged

that Excel meat of the sort at issue here qualifies as intact and unadulterated even if it bears *E. coli*. *See* Pet. App. 61a.

Respondents also try to argue (Opp. 13-14) that the FMIA's preemption provision might not apply either because the particular requirements imposed by state law here might not conflict with the federal standards or because state rules formulated in tort cases might be exempt from preemption. But respondents cannot obscure the fundamental fact that they seek to impose liability for an action (allegedly distributing intact meat bearing *E. coli*) that is authorized by federal law. While tort liability for conduct that *violates* federal law is entirely consistent with the statutory scheme, tort liability for *permissible* conduct plainly constitutes additional "[r]equirements * * * with respect to premises, facilities and operations" of federally-inspected establishments (21 U.S.C. § 678), because the threat of such liability will force meat processors such as petitioner to change the USDA-mandated and USDA-approved procedures at their plants across the country in order to comply with the standards imposed by the Wisconsin court (*see Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 521-22 (1992); *id.* at 548-49 (Scalia, J., concurring in the judgment in part and dissenting in part)). Indeed, the court below acknowledged as much (*see* Pet. App. 30a), and it attempted to avoid the express preemption provision by replacing the Secretary's definition of "adulterated" with its own interpretation.[1]

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[1] Respondents cite *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), but state tort liability survived federal preemption there only because the state "requirements" were not "in addition to" federal ones; they merely afforded remedies to parties injured by violations of federal law whose losses would otherwise have remained uncompensated. *Id.* at 486-87. Here, there is no alleged violation of federal law because federal law plainly authorizes distribution of "unadulterated" meat that the court of appeals' decision expressly forbids.

Respondents imply that the Wisconsin court's decision not to address all of these issues somehow deprives this Court of jurisdiction (even though anything the lower court might have said with respect to these matters would have been unnecessary to its holding). That is simply wrong. In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), the question was whether a California law regarding the arbitrability of certain disputes was preempted by the Federal Arbitration Act (FAA). The California Supreme Court did not address the contention that the FAA applied only to disputes that fell within the jurisdiction of the federal courts (645 P.2d at 1201), holding instead that the FAA did not preclude the State from barring waiver of judicial remedies. This Court did not conclude — as respondents urge here — that the failure to address that alternative ground for resolving the case foreclosed review. Instead, it held that jurisdiction was available under *Cox*. 465 U.S. at 6-7.

Finally, respondents assert that jurisdiction is precluded by the court of appeals' failure to address their contention that respondent Sizzler's state-law warranty claims would survive in the event the tort claims are preempted. Although we believe that the warranty claims are also preempted, whether those entirely separate causes of action may be maintained is irrelevant under *Cox*. In *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989), this Court held that it had jurisdiction to consider a constitutional challenge to indictment for violations of Indiana's RICO statute despite the fact that the petitioner did not also challenge his prosecution for the predicate offenses. Because dismissal of the RICO counts "would bar further prosecution on [those] counts," the Court held that the case "clearly satisfie[d]" *Cox* — even though the predicate state-law counts remained pending against the petitioner. *Id.* at 55.

Respondents' attempts to deflect the Court's attention from the merits of the petition are thus unavailing: the Court has the power to resolve the important legal issues presented in this

case. Indeed, if respondents' interpretations of this Court's precedents were correct, then reconsideration of those precedents would be appropriate. Preemption issues arise very frequently in state-court proceedings — as defenses to tort claims or government action. If this Court's jurisdiction could be defeated by the mere fact that the lower court did not address possible alternative bases for its ruling, then a party could effectively foreclose review by raising alternative appellate arguments (meritorious or otherwise) sufficient to ensure that the state court would decline to decide — or would merely overlook — at least one of them. That would mean defendants could almost never obtain review by this Court of unfavorable state-court decisions (because remanded cases would fall within the more than ninety-five percent of cases settled before trial), while plaintiffs would be able to seek review (because a state-court decision upholding a preemption defense would necessarily address all of the alternative arguments advanced against preemption). As a theory of appellate jurisdiction, that unbalanced approach makes no sense.

2. Respondents devote most of their remaining effort to defending the *result* reached by the court of appeals, but they expend no effort whatsoever defending the court's *reasoning*. Their arguments serve principally to confirm the need for intervention by this Court.

Respondents assert that the lower court decided that the Secretary's construction "lacked the 'power to persuade.'" Opp. 17. But that is not what the court did; it held that the Secretary had no role whatever in defining "adulterated": "[n]one of the definitions of 'adulterated' in the Act makes a distinction between intact or non-intact meat," and therefore USDA "was powerless to add that distinction to Congress's definition." Pet. App. 19a. The court ignored the Secretary's policy and gave the broad terms of the statute a rigid interpretation that requires application of the "adulterated" label

to meat bearing virtually any substance that might possibly be harmful. *See* Pet. 13-14, 16-17; Pet. App. 13a-14a.[2]

Moreover, respondents' invented rationale is no more persuasive than the court of appeals' actual reasoning. They make three basic points. First, they simply disagree with the Secretary's judgment regarding the risks of *E. coli* O157:H7 on intact meat. Undertaking their own analysis, they conclude that "the risks here were not remote" and the court of appeals "had ample evidence" of those risks. Opp. 19. As the meat-industry *amici* explain (AMI Br. 17-19), however, the Secretary's judgment rests on detailed scientific analysis, including assessment of potential costs and benefits, by recognized experts of FSIS, the National Advisory Committee on Microbiological Criteria for Foods, the CDC, the National Academy of Sciences, USDA's Agricultural Research Service, and the National Institute of Allergy and Infectious Disease. *See also* Pet. 10. Respondents offer no reason why their armchair analysis is more persuasive.

Second, respondents try to create the impression that some of the Secretary's pronouncements support their position. Certainly the Secretary has set as a goal the elimination of all *E. coli* O157:H7, but the adoption of that target for meat processing facilities' inspection plans (*see* Pet. 6-7) does not mean that the Secretary has concluded that failure to achieve it should subject meat processors to criminal and civil liability for the shipment of adulterated meat. To the contrary, the Secretary has explicitly determined that imposing that liability

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[2] Thus, respondents' assertion (Opp. 18 n.9) that the decision below would not affect other naturally-occurring pathogens simply is not true of the decision that the court of appeals wrote; it applies only to the very different analysis respondents use to defend the result below.

is *not* appropriate for intact meat.[3] Respondents' selective quotations from USDA cannot obscure that basic fact.

Third, respondents' argument rests on misunderstandings about the inspection process. For example, they assert (Opp. 13) that Congress did not mean to preempt tort claims arising out of "approved" but "contaminated" meat. But we do not contend that USDA approval is the relevant standard; if meat is "adulterated" within the meaning of the statute, the processor is subject to liability — even if the meat was inspected and approved by the federal inspectors located at the plant. In addition, respondents' claim (Opp. 19) that federal inspectors and plant employees may not know the intended use of every carcass at the time of its inspection is beside the point. The FMIA requires federal inspectors to approve not only the carcasses, but also each meat product through the entire process, up until the time that it is sealed in a package and labeled for shipment and sale (21 U.S.C. § 607).

Not surprisingly, respondents fail to mention this Court's recent decision in *Alaska Department of Environmental Conservation v. EPA*. There, the Court adopted EPA's construction of the Clean Air Act even though not embodied in a formal rule, stating that "[c]ogent 'administrative interpretations . . . not the products of formal rulemaking . . . nevertheless warrant respect.'" 124 S. Ct. at 1001 (brackets and citation omitted). Significantly, the Clean Air Act's numerous

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[3] USDA first announced the goal of reducing the presence of *E. coli* in meat to "an undetectable level" in 2002, more than two years after the plaintiffs in this case were injured. 67 Fed. Reg. 62,325, 62,329 (Oct. 7, 2002). Respondents' attempt to equate that announcement with USDA's pre-existing "zero tolerance" standard for visible fecal material (Opp. 14, 21) is belied by the Secretary's recognition, in setting the standard, that elimination of visible fecal material does not guarantee meat to be bacteria-free. *See* Pet. 10-11 n.2.

assignments of specific rulemaking responsibilities to EPA did not include the issue before the Court, yet the Court — unlike the court below — did not find that the absence of specific authority obligated it to ignore completely the agency's interpretation of the statute. *See also id.* ("well-reasoned views of an expert administrator rest on a body of experience and informed judgment to which courts and litigants may properly resort for guidance") (quotation marks and citations omitted).

Given the close similarities between the two cases, this Court may wish to consider granting the petition, vacating the judgment below, and remanding the case for reconsideration in light of the intervening decision in *Alaska Department of Environmental Conservation.*

3. The practical consequences of the decision below for the meat industry are severe. The Wisconsin court blithely cast aside an important federal standard in an area in which uniform national regulation is critical. As the meat-industry *amici* explain, the court of appeals' declaration that the Secretary lacks authority to interpret the FMIA's key terms will erode the national rules that Congress and USDA have developed over the past century to bring predictability, stability, and uniformity to the meat processing industry on the one hand (AMI Br. 11-15), and to ensure stable supplies of wholesome, affordable meat for consumers on the other (*id.* at 15-17).

Respondents' principal arguments are that the effects on uniformity will not be that great and that uniformity is not really necessary in any event. Both are demonstrably false.

Because the definition of "adulterated" is the cornerstone of the federal regulatory program for ensuring meat safety, the court of appeals' displacement of the Secretary's authority to interpret that term undermines her ability to identify and prioritize potential health threats to consumers and to direct scarce resources to meet the most pressing ones (especially

important when urgent threats such as Mad Cow Disease impose competing demands on those resources). *See* Pet. 24; AMI Br. 15. In commenting (Opp. 22) that the court below lacks formal authority to order the Secretary to alter how she implements the FMIA, respondents ignore the central issue that, by authorizing additional and potentially conflicting standards, backed by criminal and civil sanctions, the decision seriously undercuts the Secretary's ability to orchestrate a coherent regulatory program that best serves the Act's objectives.

And although respondents may not value uniformity in the regulation of meat (Opp. 23), Congress plainly does (*see* 21 U.S.C. §§ 602, 678). In holding that the Secretary's interpretation of "adulterated" may not be accorded any judicial respect, the decision of the court below stands as a blueprint for other state courts, legislators, and regulators to impose on meat processors their own idiosyncratic views — and not just with respect to meat safety. As the Product Liability Advisory Council explains in its *amicus* brief, the decision implicates the authority of federal agencies to administer critically important federal statutes dealing with, among other things, safety standards for food, drugs, medical devices, cosmetics, motor vehicles, and a broad array of other consumer products. *See* PLAC Br. 7-12; *see also* AMI Br. 13.

If the Court has any doubts about either the dramatic consequences to the meat processing industry or the substantial threat to USDA oversight of meat safety, it may wish to invite the Solicitor General to file an *amicus* brief expressing the views of the United States — especially given USDA's clear reaffirmation of its policy following the events at issue in this case. *See* Pet. App. 61a.

4. Respondents' attempts to distinguish the decisions that conflict with that of the court below simply confirm the existence of a conflict that this Court should resolve.

They point out that *Boulahanis* v. *Prevo's Family Market, Inc.*, 583 N.W.2d 509 (Mich. Ct. App. 1998), arose out of a sale of ground beef prior to the time that USDA declared such meat to be adulterated if it contains *E. coli*. But if the FMIA preempted state tort liability when the Secretary had not identified *E. coli* as an adulterant for *any* meat, then it follows *a fortiori* that tort liability must also be foreclosed for the sale of a category of meat — *i.e.*, intact cuts — for which the Secretary has maintained that position.

Meanwhile, respondents' characterization of *Grocery Manufacturers of America, Inc.* v. *Gerace*, 755 F.2d 993, *aff'd in relevant part*, 474 U.S. 801, *cert. denied in part*, 474 U.S. 820 (1985), is manifestly false. *Gerace* involved challenges to *both* an FDA regulation and a USDA interpretive rule; the Second Circuit extended *Chevron*-type deference to the former (*see id.* at 1001), but then independently analyzed and extended *Skidmore* deference to the latter (*see id.* at 1002 ("while we recognize that we are not bound by interpretive rules, we discern no reason to reject the USDA's longstanding interpretation of the FMIA") (citations omitted)).

And while *National Pork Producers Council* v. *Bergland*, 631 F.2d 1353 (8th Cir. 1980), and *Public Citizen* v. *Foreman*, 631 F.2d 969, 975 (D.C. Cir. 1980), involved formal rule-making, that in no way undercuts their basic points that Congress has granted the Secretary broad discretion to implement standards under the FMIA (*Bergland*, 631 F.2d at 1362), and that deference to her reasoned judgments is especially appropriate on issues "involving scientific and medical controversies" (*Foreman*, 631 F.2d at 975) — such as the very question at issue here.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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